ASEAN SECURITY PAPER MILLS SDN BHD

v.

COMMERCIAL UNION ASSURANCE (M) SDN BHD

HIGH COURT MALAYA, IPOH
PS GILL J
[CIVIL SUIT NO: 22-211-90]
12 MAY 2000

INSURANCE: *Fire insurance - Construction of policy - Acceptance of balance of insurance premium - Whether rendered defendant estopped from denying liability - Whether plaintiff able to prove loss - Terms of conditions in policy - Whether complied with satisfactorily by plaintiff - 'Spontaneous combustion' - Whether valid cause of fire - Element of fraud - Whether existed - Burden of proof in establishing fraud - Sudden increase in amount of insurance cover - Whether reasonable ground for suspicion - Legality of condition 19 of policy - Applicability of The New Zealand Insurance Co. Ltd. v. Ong Choon Lim - Whether condition 19 contravened s. 29, Contracts Act 1950*

This was the plaintiff's claim against the defendant, an insurance company, in respect of loss by fire of all the plaintiff's stocks of some variety of paper stocked in the plaintiff's warehouse. After the occurrence of the fire, the plaintiff had made a claim under the provisions of a fire policy obtained from the defendant, the co-insurer in regard to the policy, wherein the defendant repudiated liability to indemnify the plaintiff under the terms of the said policy. The plaintiff's case was that the fire occurred due to 'spontaneous combustion', natural, or other causes, but not deliberate. The plaintiff further raised the issue of estoppel, in that the insurers after having full knowledge of the fire, had accepted the balance of the premium before it was due, and as such, had confirmed the terms of the policy. The defendant disputed the plaintiff's claim, submitting that the claim was precluded by virtue of condition 11 and 19 of the policy and that it was forfeited by virtue of condition 12 and 13 of the same. The defendant also contended that the fire was deliberately started by employees of the plaintiff's company on the instructions of one Bala, the executive director of the plaintiff's company. The defendant, further, requested the plaintiff to prove its loss.

Held:

[1] The acceptance of the balance of the premium did appear to support the proposition that the defendant was estopped from denying liability. (p 519 f)

[2] It was clear that there were stocks present at the warehouse just prior to the fire occurring. Furthermore, there was no evidence that any stocks were removed from the warehouse prior to the fire. Thus, the extent and value of the loss had been established on a balance of probabilities by the plaintiff. (pp 515 h & 516 b)

[3] On the evidence, the plaintiff did inform Provincial Insurance Company (the main insurer under the policy) about the fire a day after it occurred and the relevant documents were served on the said insurance company on 25 September 1989. Therefore, the terms of condition 11 had been complied with satisfactorily by the plaintiff. (pp 521 a, f-h & 522 a)

[4] The contention that condition 12 was not complied with was not sustainable. If at all it was not complied with, it was due to the failure of the parties to agree to the terms of the appointment of the loss adjusters. (p 524 b & e)

[5] From the facts, the plaintiff's witnesses examined the site devastated by the fire thoroughly. After having done so, and having taken samples from the site, the witnesses could not find any evidence of hydrocarbon or accelerent being used at the site to deliberately start a fire. The witnesses, however, could not establish the cause of the fire but they could not rule out 'spontaneous combustion' as the cause of the fire. In any event, 'spontaneous combustion' according to the evidence of some witnesses, both from the plaintiff's and the defendant's, may occur in cases relating to stocks of paper. (pp 527 g & 543 f)

[5b] In contrast, none of the defendant's witnesses inspected the site of the fire. All admitted that it was crucial to visit the site. Their evidence was merely based on photographs. Thus, the evidence adduced by the defendant was based on guesswork, assumptions and vague evidence. Conclusively, the evidence of the plaintiff's witnesses was accepted as against the evidence of the defendant's witnesses. (pp 530 g-h & 531 a-c)

[6] Although the defendant called witnesses to show that Bala planned to set the fire to the warehouse through his employees at the material time, the evidence tendered was not only tainted but totally unreliable. (p 542 f-g)

[7] In raising the issue of fraud on the part of the plaintiff, the burden of proof on the defence is that of proof beyond reasonable doubt. The defendant here had failed to prove fraud against the plaintiff beyond reasonable doubt. There may be suspicion that the fire was self-induced by the plaintiff, however, fraud must be established beyond all reasonable doubt. It should not be based on mere suspicion and conjecture. (p 542 a-c)

[8] The defendant also submitted that there was a sudden increase in the amount of insurance cover for the plaintiff which was rather suspicious as it took place prior to the fire. The increase in insurance cover was done on a mutual basis by the insurer and the insured. Just because it occurred prior to the fire itself, it should not be viewed with suspicion. In any event, the company was wound up after the fire but was trading at a profit before the fire occurred. On the totality of the evidence, fraud had not been proved beyond a reasonable doubt. (p 544 b-c)

[9] The fire occurred on 11 September 1989 while the plaintiff filed the writ on 11 September 1990. The defendant contended that the filing of the writ was not within the twelve months period as stipulated in condition 19 of the policy. The legality of condition 19 was considered in The New Zealand Insurance Co. Ltd. v. Ong Choon Lim where it was held that a similarly worded condition 19 of a fire policy contravened s. 29 of the Contracts Act 1950. In light of the clear provision of s. 29, the defendant's contention that the plaintiff had breached condition 19 was untenable. (pp 545 c-g & 546 a)

[Claim allowed.]

Case(s) referred to:

ALN Narayann Chettyar & Anor v. Official Assignee High Court Rangoon & Anor [1941] AIR 93 Privy Council ***(refd)***

Bousted Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank [1995] 4 CLJ 283 FC ***(refd)***

Chop Eng Thye Co v. Malaysia National Insurance Sdn Bhd [1977] 1 MLJ 161 ***(refd)***

Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal [1997] 3 CLJ 189 FC ***(refd)***

De Bussche v. Alt [1978] 8 Ch D 286

Eastern & Oriental Hotel 1951 Sdn Bhd v. Ellarious George Fernandez & Anor [1989] 1 MLJ 35 ***(foll)***

Federated Malay States in Corporation Royal Exchange v. Teck Guan [1912] 3 FMSLR 92 ***(foll)***

Hansraj Gupta & Ors v. Dehtra Dun-Mussoorie Electric Tramway Co Ltd [1940] AIR 98 Privy Council ***(refd)***
Hemmings v. Sceptre Life Association Ltd [1905] 1 Ch 365 ***(refd)***
MMA Holding Sdn Bhd & Anor v. Ng Siew Wah & Ors [1986] 1 MLJ 170 ***(refd)***
Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 FC ***(foll)***
The New Zealand Insurance Co Ltd v. Ong Choon Lim t/a Syarikat Federal Motor Trading [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230 FC ***(foll)***
WF Alan & Co Ltd v. El Nasr Export & Import Co [1972] 2 QB 189
Wing v. Harvey (1) [1854] 5 DM & G 265 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 29
Evidence Act 1950, s. 114(g)
Insurance Act 1996, s. 151
Interpretation Act 1948 and 1967, ss. 54, 105
Penal Code, ss. 34, 109

For the plaintiff - CK Leong; M/s CK Leong & Co, Karpal Singh; M/s Karpal Singh & Co, Christopher Fernando; M/s Aris Rizal & Christopher Fernando
For the defendant - Porres Rayan (T Suther & Micheal Lum); M/s Shook Lin & Bok

Reported by Raja Vishnu Sivarajah

JUDGMENT

PS Gill J:

The plaintiffs, Asean Security Paper Mills Sdn Bhd (hereinafter referred to as ASPM) is a private limited company incorporated in Malaysia. It was at all material times involved in the purchase and sale of various categories of paper including security paper. Pursuant to its business activities, it stored its goods initially at a KTM warehouse in Kuala Lumpur, and later at a warehouse in Kg. Acheh, Sitiawan. Plaintiffs obtained sometime on 23 July 1989, fire insurance coverage from Provincial Insurance (M) Sdn Bhd and Commercial Union Assurance (M) Sdn Bhd for a sum of RM14,932 million in respect of the goods stored at its warehouse. Later on 29 August 1989 the sum insured was increased to RM32,431 million with effect from 30 August 1989. The items insured were as follows:

Item 1. On stock in trade of brilliant White/security/woodfree Asean Bond Paper, Computer Listing/Computer Forms, Elan Papers, Asean Speciality Papers and Papers of every description.

– RM32,000,000

Item 2.	On five (5) steel cabins @ $32,400 each, furniture, fixtures & fittings equipment for $20,000	–	RM 182,000
Item 3.	On building (Warehouse)	–	RM 200,000
Item 4.	On one (1) unit Forklift	–	RM 49,000
	Total	–	RM32,431,000

Commercial Union Assurance (M) Sdn. Bhd. Were co-insurers for the policy Under the co-insurance clause, that forms part of the policy, the following endorsement was made.

> The insurance by this Policy is hereby agreed and declared to be limited to One Hundred (100) percent of the Sum Insured as set out below.
>
> The words "The Company" appearing in me Policy shall be substituted for the words "The Insurers" and the Policy shall be construed accordingly.
>
> The words 'The Insurers" shall mean the following Companies which shall be liable for their stated proportion of the Sum Insured.
>
> All extensions, reductions, or cancellations of risks or of conditions, all fixing of premiums, all settlements of claims or contestations whatsoever and in general, all dispositions of whatsoever nature taken by the Leading Co-Insurer will definitely be binding upon all Co-Insurers and carry with them the unanimous consent of all Co-Insurers of this Policy. All Co-Insurers hereby expressly authorise the Leading Co-Insurer to sign Policies and Endorsements for the account, and hereby undertake to consider documents so signed as having signed by themselves.

Co-Insurer Proportion Of Sum Insured	**Proportion**
Provincial Insurance (Malaysia) Sdn Bhd	50%
Commercial Union Assurance	50%

On 11 September 1989, a fire occurred at the warehouse in Kg. Acheh, Sitiawan resulting in the loss of all the stocks of a variety of paper stored in the warehouse. Apart from the stocks being burnt, the warehouse and a forklift were also burnt.

The same day the Managing Director of Amanah Lowndes Lambert Sdn Bhd (the insurance brokers) was informed of the fire by Mr. Balasingam, who was then a Director of ASPM. The next morning on 12 September 1989, Mr. Chan Kien Fatt of Provincial Insurance was also informed about the fire.

After the occurrence of the fire, the plaintiffs made a claim under the provisions of the policy and submitted a number of documents to the Provincial Insurance Company. However, the latter wrote to the plaintiffs on 1 November 1989 wherein they repudiated liability to indemnify the plaintiffs under the terms of the policy.

Consequently, the plaintiffs filed a writ against Provincial Insurance Company in the High Court Kuala Lumpur (CS No. D2-22-2458-89) on 21 November 1989, and later filed a writ against the defendants on 11 September 1990. Counsel for the defendants in his submission stated that the causes of action in both suits are based on the same policy in respect of the same fire. The only difference being the identities of the defendants, and the amount claimed.

In this instant case, the plaintiffs' claim against the defendants, who were the co-insurers, is for a sum of RM16,124,500 pursuant to the policy which they allege is an agreed valued policy. The defendants denied in their amended defence that the policy was an agreed valued policy, and requested the plaintiffs to prove their loss. Defendants also pleaded that the ASPM's claim is precluded by virtue of Condition 11 and 19 of the policy, and is forfeited by virtue of Condition 12 and 13 of the policy.

Is The Policy A Valued Or Unvalued Policy?

The policy provides, subject to certain conditions, that if the property insured is destroyed or damaged by fire, the insurer will pay to the insured the value of the property at the time of the damage to the property by fire. There were other pertinent conditions in the policy which will be referred to later.

The main terms of the said insurance policy – (P3) were related to fire and lightning and other standard clauses typical of this type of policy. The policy also covered an item under "spontaneous combustion". According to the evidence of Mr. Soong Chak Choy – (PW3), this term is peculiar to companies that deal in security paper. In para. 2 of the policy, the operative words are, to quote "The company will pay to the insured the value of the property at the time of the happening of its destruction, or the amount of such damage."

The defendants' counsel at the trial submitted that the policy was an unvalued policy as distinct to that of a valued policy.

A valued policy by definition is a policy where parties to the contract agree on the value to be placed on the property insured for the purpose of determining the quantum of indemnity. In such a policy, the valuation placed on the subject matter in the policy, except in the case of fraud, or mistake, conclusively

establishes the sum required for the purpose of a full indemnity, in case of total loss. The insured is therefore dispensed from the necessity of dealing with question of amount, and is entitled on proving the fact of his loss to recover the amount insured on the subject matter of the insurance, in a case where the insured claims under an unvalued policy, he must prove the extent and value of his loss at the time of the occurrence of the loss.

The amount recoverable will depend on whether the policy limits the maximum amount of indemnity recoverable or not. When there is no limit, the insured is not entitled to recover the market value of the policy.

The plaintiffs in their pleadings and other evidence adduced in court, alleged, that the policy in question was a valued policy, bearing in mind the evidence of Mr. Tan Cheng Hin – (PW13) who was the Branch Manager and Senior Representative of Provincial Insurance, Ipoh, and the endorsement he made on 8 September 1989 in the Stock Book – (P32) at the warehouse, at the premises of ASPM. The defendants disputed the contention, and argued that the policy was an unvalued policy. To my mind, after reviewing the provisions of the policy, and evidence adduced at the trial, I am of the view that this is a valued policy.

Be that as it may, even assuming that the policy is an unvalued policy, it would still be pertinent to make a finding as to whether the plaintiffs have proved the extent and value of its loss.

Mr. Tan Cheng Hin – (PW13) stated in evidence that he was the Branch Manager of Provincial Insurance Sdn Bhd, Ipoh in 1989. He confirmed that his insurance company had agreed to issue a policy of insurance to the plaintiffs in regard to certain goods stored by plaintiffs in their warehouse in Kg. Acheh, Sitiawan. The amount the goods were insured was for RM32,431,000 million. Defendants were co-insurers in regard to the said policy.

Pursuant to the issuance of the policy, PW13 was instructed by the company to inspect the goods stored in the plaintiffs' warehouse. PW13 went to the warehouse on 8 September 1989 together with Mr. Soong Chak Choy – (PW3) who was then the Managing Director of Amanah Lowndes Lambert Sdn Bhd, and a broker (Mr. T.F. Foo), for the plaintiffs' company. His firm had arranged the Fire Insurance policy for the plaintiffs.

PW13 claimed to be an experienced insurance man having checked stocks in other companies prior to the inspection of the plaintiffs' warehouse. The purpose of going to the warehouse was not only to inspect, but also to check the stocks. He arrived at the warehouse at 11.30am and observed a lot of stocks there. He also took a number of photographs. He inspected the stocks, and stated the stocks were all there. After the inspection he was shown a Stock Book, and signed a number of pages. At p. 26 he wrote the following words "Provincial Insurance, verified, initialed, and dated 8 September 1989." At p. 27, the same words were written together with the time "6.15pm". PW13 stated under re-examination that he had signed the Stock Book because he had seen the stocks, and would not have signed the Stock Book if there had been no stocks in the warehouse. PW13 spent about 6 hours inspecting the stocks. Thus, PW13 had confirmed the value of the stocks present in the warehouse on 8 September 1989, ie, three days prior to the fire.

It was argued by counsel for the defendants that PW13 did not have the authority to value the stocks on behalf of the defendants' company because he was at the material time only the Branch Manager of Provincial Insurance, Ipoh. But the fact still remains that PW13's action also binds the defendants since the policy itself was insured by Lead Insurer and the defendants as co-insurers. Section 151 of the Insurance Act 1996 (Act 553) provides that:

> (1) A person who is authorised by a licensed insurer to be its insurance agent and who solicits or negotiates a contract of insurance in that capacity shall be deemed, for the purpose of the formation of the contract of insurance, to be the agent of the licensed insurer and the knowledge of that insurance agent shall be deemed to be the knowledge of the licensed insurer.

The verification of the stocks in the Stock Book by PW13 was done by an authorised agent of the Insurer as provided for by s. 151 of the Insurance Act 1966 (Act 553), and the knowledge of, and statement by the authorised agent, is therefore deemed to be the knowledge and statement of the Insurer. As such the statement by PW13 would therefore bind the defendants.

Furthermore, this verification, was corroborated by PW3 who confirmed that he was present at the warehouse when Mr. Tan Cheng Hin – (PW13) visited the warehouse on 8 September 1989 to see the stocks in the warehouse. He was shown extracts of the stocks from the Stock Book, and stated he was present when PW13 signed the various pages in the Stock Book. He also saw PW13 inspecting the stocks, and saw PW13 taking a number of photographs.

In addition to that, numerous witnesses gave evidence of their business dealings with the plaintiffs prior to the fire.

Mr. Hor Peng Meng – (PW4) stated that in 1989 he was working for Messrs. Francis Lee & Co as an Audit Manager. The plaintiffs were a client of his company. On 7 September 1989 he made a stock check at plaintiffs' warehouse in Sitiawan. He went there with his colleague Mr. Khong Yun Kee – (PW5). He further stated in evidence that he met En. Yang Razlan – (FW17) at the plaintiffs' premises on the date of his visit there. He was instructed by Mr. Francis Lee (deceased) to conduct a physical stock account of the goods at the warehouse and to compare it with the stock records. He gave details of the stock checking, of the various types of the stocks at the warehouse. Mr. Khong assisted him. He took about six hours to check the stocks, and after having checked the stocks, he concluded that the contents in the warehouse corresponded to the items in the Stock Book. The value he noted in the Stock Book for Asean Reels amounted to RM3,452,816.47 million, and for Asean Speciality Paper High Quality for RM30,196,500 million. After he had checked all the stocks, he put his company's chop on the Stock Book in regard to the items he had checked.

PW4 gave details of his examination of the various goods stored at the premises. Among the goods PW4 saw at the premises were 856 boxes of Computer Stock Forms, Asean Bond Paper of two different sizes contained in 44 reams, and Asean Security Paper High Quality in 1473 reams. Apart from this, PW4 also saw paper in Asean reels. He stated that Mr. Khong assisted him in counting the stocks in the store. The contents in the warehouse corresponded with the items in the Stock Book.

Apart from checking and counting the stocks in the warehouse, PW4 also examined sales contracts, and invoices. After examining the documents mentioned above, PW4 came to the conclusion that Asean Speciality Paper High Quality was valued as per sales contract at RM20.50 per sheet. PW4 also examined a series of sales invoices for Asean Reels. He believed that the documents were genuine, and showed the amount of values. Under cross-examination, he stated that he did not see any documents showing the purchase price, and added that usually the Stock Book would not mention the value of stocks disposed off. PW4 also stated that he went to the warehouse to check the physical quantities in the warehouse, and not the price of the goods. PW4 was satisfied with the quantity checked in the warehouse, and the stocks tallied with the details in the Stock Book.

PW4 was assisted in his work of checking the stocks in the warehouse by Mr. Khong Yun Kee – PW5 who was working as an Audit Manager for Messrs. Francis Lee. He corroborated PW4's evidence in material particulars.

Dr. Hamzaid bin Yahya – (PW14) stated in 1989 he was working as a director of a company named B & H Form Print Sdn Bhd. He knew of the plaintiffs' company, as his company had purchased paper from the plaintiffs for the purpose of supplying to customers such as Income Tax Form and Rates of Bills. This company acted as a government contractor. He confirmed that the company had purchased goods in the form of paper from plaintiffs for a total sum of RM2,514,186.89 million. Witness also referred to certain invoices attached to a Statutory Declaration – (P26) made by him. The invoices referred to Computer Form Paper. The company purchased paper in bills and converted it into invoices. PW14 also visited plaintiffs' KTM warehouse in Brickfields, Kuala Lumpur and in Sitiawan to ascertain that plaintiffs' had the goods physically to supply to PW14's company. Upon examining the goods, witness was satisfied that the goods were physically present in the warehouse, and in good condition.

Mr. Soon Kwai Choy – (PW12) the Honorary Vice President of Malaysian Institute of Accountants was in 1988 Deputy General Manager of Finance of Guthrie Trading Corporation Sdn. Bhd., a leading Trading House in Malaysia. He testified that his company at that point in time had purchased high quality security paper from plaintiffs. In the course of a year, his company had purchased security paper to a value of RM2 to RM3 million dollars from the Plaintiffs. Apart from purchasing the paper PW12 had also visited the warehouse belonging to the plaintiffs' at Jalan Brickfields, Kuala Lumpur. He looked at the type of paper kept there. In fact the company had issued Letters of Credit to the plaintiffs for the purchase of RM3 to RM4 million dollars of paper. The high quality paper was to be used for the purpose of Road Tax disc. PW12 was aware about the orders for the purchase of the paper because purchase orders were sent to him to establish Letters of Credit when goods were in store, as he would be informed that the consignment had been delivered.

Mr. Tay Beng Wah – (PW15) worked in 1989 as Division General Finance Manager of Pernas Trading Sdn. Bhd., a major trading company in Malaysia. He stated that his company purchased Asean Bond Paper – a type of security paper from the plaintiffs, in March 1988 and August of 1989 for a total sum of RM1 million. His company also placed orders for the purchase of security paper worth RM14 million by opening Letters of Credit, and had in fact paid the Plaintiffs a deposit of RM1.4 million. The paper was however not delivered. He stated that the Asean Bond Paper were to be used for the purpose of

printing currency, and other security documents such as Share Certificates. He had in fact personally seen the Asean Bond Paper in the store of Pernas Trading. All orders made were accompanied by documents.

En. Yang Razlan – (PW17) stated in evidence that in 1989 his company Innovex Sdn. Bhd. entered into an agency with the plaintiffs. The company entered into an agreement with the plaintiffs to purchase High Quality Specialty Paper, and produced certain invoices for the purchase of paper.

Pursuant to this, he and his partner went to see the plaintiffs' warehouse in Sitiawan either on the 7 or 8 September 1989. There he checked the quality of paper, and was satisfied with the quality. He spent about three hours inspecting the warehouse, and the goods therein. His orders for the supply of the paper were not fulfilled, as there had been a fire at the warehouse. He stated that his company had placed orders worth RM30,135 million for the supply of paper. In 1989, PW17's company was a contractor with the Federal Treasury, and was to supply computer paper to the government. There was also a potential customer for High Quality paper named Happynox Ltd. Co. based in Hong Kong.

It was argued by counsel for the defendants that the Innovex Sdn Bhd transactions were not genuine.

It must be noted that Innovex Sdn Bhd is a legal entity, and entered a series of contracts with the plaintiffs' company to purchase Asean High Quality Speciality Paper. There were certain invoices produced to support the claim. Although PW17 stated that there was a potential purchaser of their goods namely Happynox Ltd. Co., PW17's company decided to buy the paper themselves because the market was good and his company could mark up the price and make a profit.

After having given careful consideration to the evidence of PW17 on all aspects, I hold him to be an honest, and credible witness, and I have no reason to doubt the validity of the various transactions that his company entered into with the plaintiffs. In fact, PW17's company filed a suit against the plaintiffs, and obtained judgment.

The evidence given by the above mentioned witnesses makes it abundantly clear that there were stocks present at the warehouse just prior to the fire occurring. As it was held by the Court of Appeal case of *Commercial Union Assurance (M) Sdn. Bhd. v. Ng Chek Hung and Another Appeal* [1997] 3 CLJ 189:

the close proximity in time between the inspection by the appellant's agent and the fire, well entitled the learned judge to conclude that the loss as claimed had been established.

Furthermore, there was no evidence that any stocks were removed from the warehouse prior to the fire. It is thus the finding of this court that the extent and value of the loss has been established on a balance of probabilities by the plaintiffs.

Counsel for defendants made certain observations in regard to the evidence of Mr. Appadurai s/o Doraisamy – PW18. This witness stated that in 1989/1990, he was a Senior Investigator at the Commercial Crime Division at Bukit Aman, Kuala Lumpur with the rank of Deputy Superintendent of Police, and was asked to investigate into the fire at the plaintiffs' warehouse at the relevant period. He seized a number of documents in the course of his investigation including a Stock Book – (P32). He confirmed that pp. 26 to 30 of PBD were photostat copies of the original Stock Book that has been misplaced. He stated that the details of the Stock Book indicated that paper worth RM331/2 million was stocked at the warehouse.

This witness also stated that PW17 did not mention to him in the course of his investigation about a company named Happynox in Hong Kong, and that PW17's company had received an order from Happynox. It is my view that much would depend as to whether PW17 was questioned specifically on these matters as it is common knowledge that a witness answers only questions that are asked during the course of police investigation.

As to PW18's evidence that he asked his officer to carry out investigations about the importation of paper by plaintiffs, witness admited that he did not go to various companies personally to check about the importation of paper. He only learned about it from his subordinates. This to my mind is hearsay evidence, and I attach no weight to it.

The Issue Of Estoppel By Conduct

An issue in regard to estoppel by conduct was raised by counsel for the plaintiffs, in that the insurers after having had full knowledge of the fire, accepted the balance of the premium before it was due, and as such confirmed the terms of the policy. PW3 in his evidence confirmed that the balance of the premium towards the policy was paid the plaintiffs (see P38, P38B and P38C) to the insurers soon after the occurrence of fire as demanded by the Insurer *vide* a letter dated 22 September 1989 from Provincial Insurance (M) Sdn. Bhd.

In the case *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank* [1995] 4 CLJ 283, Gopal Sri Ram JCA in reviewing the Law of Estoppel stated:

> The true principle in such cases is to be found in the following passage in the judgment of Thesiger LJ in *De Bussche v. Alt* [1878] 8 Ch D 286 at p. 314:
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> > If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.

In *MMA Holdings Sdn Bhd & Anor v. Ng Siew Wah & Ors* [1986] 1 MLJ 170, VC George J (now JCA) was faced with a case where the defendant had remained silent while the purchaser had paid moneys to him. Of the defendant's silence, that learned judge said at p. 176:

> Having silently stood by and allowed the purchasers to find and pay the balance of the purchase price and then wait for another 38 days before insisting on compliance of the requirement to apply to the FIC although the parties had expressly agreed that whether the FIC approval was obtained or not was not to have any effect on the contract is I think the height of inequity. Robert Goff J stated the principle of this aspect of equitable estoppel in *Societe Italo-Belge v. Palm Oils* [1982] 1 All ER 19 at pp. 26-27 thus:
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> > The fundamental principle is that stated by Lord Cairns LC, viz, that the representor will not be allowed to enforce his rights where it would be inequitable having regard to the dealings which have thus taken place between the parties. To establish such inequity, it is not necessary to show detriment; indeed, the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights. Take the facts of *Central London Property Trust Ltd v. High Trees House Ltd* [1947] KB130; [1956] 1 All ER 256, the case in which Denning J breathed new life into the doctrine of equitable estoppel. The representation was by a lessor to the effect that he would be content to accept a reduced rent. In such a case, although the lessee has benefited from the reduction in rent, it may well be inequitable for the lessor to insist on his legal right to the unpaid rent, because the lessee has conducted his affairs on the basis that he would only have to pay rent at the lower rate; and a court might well think it right to conclude that only after reasonable notice could the lessor return to charging rent at the higher

rate specified in the lease. Furthermore it would be open to the court, in any particular case, to infer from the circumstances of the case that the representee must have conducted his affairs in such a way that it would be inequitable for the representor to enforce his rights, or to do so without reasonable notice.

Lord Denning in *WF Alan & Co Ltd v. El Nasr Export & Import Co* [1972] 2 QB 189 said:

> If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, an he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so.
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> Before we conclude on the law upon the subject at hand, there are two elements of the doctrine of estoppel which we think require clarification and restatement. The first concerns the effect which the representation or encouragement had upon the mind of the person relying upon the estoppel; the second has to do with the requirement that such a person should have acted to his detriment.
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> The traditional view adopted by jurists of great learning is that a litigant who invokes the doctrine must prove that he was induced by the conduct of his opponent to act in a particular way. However, having undertaken a careful examination of the authorities, we are of opinion that this requirement is not an integral part of the doctrine. All that a representee (which term includes one who has received encouragement in the sense we have discussed earlier) need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's actings. Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that 'his conduct was so influenced by the encouragement or representation ... that it would be unconscionable for the representor thereafter to enforce his strict legal rights' (per Robert Goff J in *Amalgamated Investment* [1982] 1 QB 84 at p. 705).

Counsel for plaintiffs referred to the case of *Wing v. Harvey (1)* [1854] 5 DM & G 265 where it was held in the Court of Appeal that:

> the acceptance of premiums with the knowledge of circumstances entitling the insurer to avoid the policy, estopped him from averring that by reason of those circumstances the policy was not valid.

Counsel for plaintiffs also referred to the case of *Hemmings v. Sceptre Life Association Limited* [1905] 1 Ch. 365. The brief facts of the case were as follows:

> A policy of life insurance was granted upon the basis of a proposal which concluded with a declaration that the answers given in the proposal were true to the best of the proposer's knowledge and belief, and an agreement that the proposal and declaration should be the basis of the contract, and that if it should thereafter appear that the proposer had made any untrue statement therein the policy should be void and the premiums forfeited. In the proposal the assured made a mistake as to her age, and stated that she was three years younger than she was. The policy, after reciting the declaration the statement by the assured as to her age, evidence of which the insurance company required to be produced, provided for the payment by the company of the policy moneys upon proof of death of the assured, or of her having attained the age of sixty years, and it contained a proviso for avoidance of the policy and forfeiture of the premiums in the event of the policy having been obtained by willful misrepresentation. After discovery of the mistake as to the age of the assured the company accepted two annual premiums.
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> The Court held that:
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> > by accepting premiums after knowledge of the facts they must be taken to have affirmed the policy as it stood, and that consequently they were bound to pay the policy moneys upon the assured actually attaining the age of sixty year, and were not entitled to postpone payment until the assured had attained that age upon the assumption of her age at the date of the proposal having been as therein stated.

Counsel for plaintiffs also argued that the Insurers had not repudiated the policy, and by demanding the balance of the premium precluded themselves from repudiating the claim. It is my view that, at the very minimum, the acceptance of the balance of the premium does appear to support the proposition that the defendants' are estopped from denying liability.

In the course of his submission, the learned counsel for defendants submitted that the plaintiffs had breached conditions 11, 12, 13 and 19 of the said policy.

The Compliance Of Condition 11 Of The Policy

Condition 11 states as follows:

> On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company, and shall within 15 days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company.

(a) a claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind.

(b) Particulars of all other insurances, if any.

The Insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specifications, books, vouchers, invoices, duplicated or copies thereof, documents, proofs and information with respect to the claim and the origin and cause of fire and the circumstances under which the loss of damages occurred, and any matter touching the liability or the amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.

No claim under this Policy shall be payable unless the terms of this condition have been complied with.

The defendants had contended that the plaintiffs did not submit their claim within the required period in compliance with condition 11 of the policy ie, by 25 September 1989.

Mr. Lau Yen Thin – (PW8) an Insurance Agent of more than 20 years experience stated in evidence that he used to give business to Provincial Insurance Company and receive commission from the said company. He knew of plaintiffs' company through Mr. Balasingam. He stated that on 11 September 1989, he went to see Mr. Balasingam at about 4pm at the warehouse and noticed it was on fire. He noticed that Mr. Balasingam arrive at the site at about 5pm to 6pm.

Subsequently after the fire, a week later, on 23 September 1989, Mr. Balasingam met Mr. Lau Yen Thin – (PW8) and asked him if he knew anyone in Provincial Insurance, Kuala Lumpur, and the address of the company. PW8 stated that he knew one C.L. Wong – a General Manager of Provincial Insurance in Kuala Lumpur. Mr. Balasingam asked PW8 to accompany a staff member Mr. Matthew Selvarajah – (DW37) to Kuala Lumpur to hand out some documents pertaining to a claim he was making deriving out of the fire.

On 25 September 1989, PW8 accompanied Mr. Matthew Selvarajah to deliver some documents to Provincial Insurance office in Kuala Lumpur. The documents were:

(a) Stock record in the warehouse.

(b) Chemist report.

(c) Police report

(d) Fire Brigade report

(e) Company's Annual Report.

He noticed DW37 handing the documents and two letters dated 23 September 1989 and 25 September 1989 to a receptionist at the office of Provincial Insurance Company who had chopped a copy of the company's notice, and had returned it to DW37.

Under strenuous cross-examination by defendants' counsel, PW8 maintained his stand that the documents were delivered to Provincial Insurance on 25 September 1989. DW37 affirmed an affidavit of service (P9) to the effect that he had served the relevant documents to the Provincial Insurance Company on the date mentioned.

In fact, DW29 – Mr. Chan Kien Fatt who was an employee of the Provincial Insurance at the material time stated that a receptionist named Nor was working at their office at the relevant period, and confirmed that P43, P44 and P45 are letters that bear the company's chop written by ASPM to Provincial Insurance.

In fact the plaintiffs' informed the insurer – Provincial Insurance about the fire a day after its occurrence, and on 12 September 1989, the representative of the Insurance Company, and loss Adjusters, went to the premises of the plaintiffs.

I hold as a fact that after having heard and reviewed all the evidence on this issue, the plaintiffs did inform the Insurance Company about the fire a day after it occurred, and the relevant documents were served on the Insurance Company on 25 September 1989 by both PW8 and DW37.

As such it is my view that the terms of condition 11 had been complied with satisfactorily by the plaintiffs.

The defendants' have also contended that the plaintiffs' claim was forfeited for non-compliance of condition 12 of the policy which states:

Condition 12:

On the happening of any loss or damage to any of the property insured by this Policy, the Company may:

(a) enter and take and keep possession of the building or premises where the loss or damage has happened.

(b) take possession of or require to be delivered to it any property of the Insured in the building or on the premises at the time of the loss or damage.

(c) keep possession of any such property and examine, sort, arrange, remove, or otherwise deal with the same.

(d) sell any such property or dispose of the same for account of whom it may concern.

The powers conferred by this Condition shall be exercisable by the Company at any time until notice in writing is given by the Insured that he makes no claim under the Policy, or, if any claim made, until such claim is finally determined or withdrawn, and the Company shall not by any act done in the exercise or purported exercise of its powers hereunder, incur any liability to the Insured or diminish its right to rely upon any of the conditions of this Policy in answer to any claim.

If the Insured or any person on his behalf shall not comply with the requirements of the Company or shall hinder or obstruct the Company in the exercise of its powers hereunder, all benefit under this Policy shall be forfeited.

The Insured shall not in any case be entitled to abandon any property to the Company whether taken possession of by the Company or not.

After the occurrence of the fire, the Insurers had appointed Messrs. McLaren Saksama Sdn Bhd as the adjusters. This appointment was not made with the concurrence of PW3's firm or the plaintiffs'.

Sometime in September 1989, Mr. Soong Chak Choy – (PW3) who was at the material time the broker of the plaintiffs' company became aware of the fire and went to the site in Sitiawan accompanied by his colleague, and there he met a loss adjuster – Mr. Lum Siew Wai (DW27) at the site. Mr. Lum Siew Wai – (DW27), a Chartered Loss Adjuster stated that he went to the site in Sitiawan, with (DW26), Mr. Abdul Razak b. Abdul Manaf, on 12 September 1989. He was met by Mr. Balasingam, Mr. Foo, and Mr. Soong.

Mr. Lum claimed to have been appointed by Provincial Insurance Company, but did not have a letter of appointment. However, he was allowed to inspect the site, and to take a number of photographs and also took measurements. DW27 recommended that a forensic scientist be appointed to visit the site.

The plaintiffs contended that the condition of the appointment of the Loss Adjusters in the event of a loss or damage was governed by the contents of a letter dated 24 July 1989 from Provincial Insurance (the main insurer) to the plaintiffs whereby at p. 2 of the letter, it was stated:

> We wish to advise you that in the event of a loss or damage, the loss Adjusters to be appointed will be subject to confirmation with you and your insurance broker.

This was supported by another letter from Provincial Insurance to the plaintiffs *vide* a letter dated 29 August 1989 where it was again stated at p. 3 of the letter:

> We wish to advise you that in the event of a loss arising, a Loss Adjuster with the consent of your insurance broker and you will be appointed within seventy-two (72) hours.

In fact, contrary to the above, Mr. Chan Kien Fatt – (DW29) who was then the Claim Executive of Provincial Insurance at the material time stated in his evidence that when he appointed McLaren as adjusters, he did not seek the permission of the insured, or the Insurance Brokers.

Forensic Services were apparently appointed by the defendants. They were however unable to visit the site because the Sitiawan police have advised ASPM not to permit anyone into the site as the government chemist had not completed his investigation.

As evidenced in a letter from the plaintiffs to the defendants dated 20 September 1989, the plaintiffs had initially allowed a representative of McLarens Saksama (M) Sdn Bhd, to have access to the site and the procurement of the services of Forensic Services (M) Sdn Bhd subject to the release of all reports, documents and information to the plaintiffs.

However, this was never agreed to by the defendants as evidenced by their reply on the same day.

In fact, as a sign of goodwill the plaintiffs had sent to the defendants copies of the Fire Brigade Report, and all other documents to facilitate the investigation of the loss. Thus, there was no question of the plaintiffs being uncooperative.

It was argued by counsel for plaintiffs that the plaintiffs's request for the appointment of an adjuster was a reasonable one, bearing in mind that it was a term of the policy, that their consent should be obtained, if an adjuster was to be appointed. It was, counsel argued, the obstinacy of the insurers in insisting to their own adjusters, that ultimately no adjuster was appointed. I find that there is merit in the submission of plaintiffs' counsel on this matter.

The defendants had argued that there was no pre-condition to the appointment of the Loss Adjusters.

However, during cross-examination, Mr. Chan Kien Fatt – (DW29) who was acting as Claim Manager of Provincial Insurance Company at the material time, stated that the issue and compliance of pre-condition is very important. He admitted that there was a pre-condition in existence, and further stated that if a pre-condition exists in a policy, it had to be fulfilled. He admitted that it was the management's decision of the Provincial Insurance Company in not complying with the said pre-condition in the policy.

As such, I find that the contention of the defendants' counsel that condition 12 was not complied with, is not sustainable. If at all, it was not complied with, it was due to the failure of the parties to agree to the terms of the appointment of the Loss Adjusters.

The defendants also claimed that the policy was forfeited due to condition 13, which states:

Condition 13:

> If the claim be any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or any one acting on his behalf to obtain any benefit under this Policy; or, if the loss or damage be occasioned by the willful act, or with the connivance of the Insured; or, the claim be made and rejected and an action or suit be not commenced within the three months after such rejection, or (in case of an Arbitration taking place in pursuance of the 18 Condition of this Policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, all benefit under this Policy shall be forfeited.

Both plaintiffs and defendants agree that the fire took place at the warehouse on or about 11 September 1989, but the parties dispute the manner, and time as to how the fire started.

The plaintiffs' case is that the fire occurred due to "spontaneous combustion", natural, or other causes, but not deliberate.

In regard to the investigation in the cause of the fire, the plaintiffs called PW9 and PW11 to give their evidence in Court. The plaintiffs' witness Mr. Amar Singh – (PW9) was the Senior Chemist and Director of Chemistry Department, Perak, and has had 30 years of experience as a government chemist, and has given evidence as an expert witness on numerous occasions in court where his evidence has always been accepted. His report arising out of his investigation into the cause of the fire at the plaintiffs' warehouse in Kg. Acheh, Sitiawan was produced and marked as P12.

PW9 stated in evidence that he was informed about the fire on 12 September 1989, and Ketua Balai Polis Sitiawan Sgt. Abdullah b. Mat – (PW7) requested him to investigate the cause of the fire at the plaintiffs' warehouse. PW9 told Abdullah bin Mat (PW7) to cordon off the site of the fire, and not to allow anyone to enter the site until he had completed his investigation. The reason given for this directive by PW9 was to stop anyone from entering the site, and to prevent any tampering of evidence at the site. He stated that by tampering he meant that no one should be able to remove any items that may have started the fire. This would include some outsiders placing some extraneous material at the site of the fire.

On 15 September 1989, PW9 went to the site of the fire at the plaintiffs' warehouse. He was taken there by Sgt. Nik Awang. PW9 spent about two hours at the site carrying out a detailed investigation and taking samples for analysis. He also took photographs at the scene.

In the course of his investigation into the cause of the fire, PW9 stated that he did not find any traces of chemicals or hydrocarbon, and could not determine how the fire started. He was informed that security paper was stored in the warehouse prior to the fire, and since security paper had special additional chemicals, it could be prone to "spontaneous combustion". He explained that certain chemicals react at certain temperature and humidity. This would trigger a fire without outside interference. However in this case, he could not say if "spontaneous combustion" took place, but nevertheless he could not discount it as the cause of the fire.

Under cross-examination, PW9 stated that he took six samples near the seat of the fire on his first visit to the site, and after testing the samples they tested negative for hydrocarbon. He also contends that the debris at the site was all reduced to ashes. PW9 stated that he arrived at his conclusions after inspecting the site, taking samples and examining the debris. PW9 also did not find any evidence of explosion at the site and neither did he find any paper that had been shredded.

Under cross-examination, witness stated that he had come across literature where it was stated that paper was capable of "spontaneous combustion". He further testified that nitric acid was used in the manufacture of security paper and since nitric acid contain nitrates, that substance is combustible with other materials which could then burn spontaneously.

In his opinion, if paper is stacked tightly, the top and bottom would burn, but not the core. Lastly, PW9 stated that since the roof of the warehouse was metallic, the heat caused by the fire would have been reflected by the metal roofing, and if the heat was sufficiently hot and intense, it could start a new fire,

PW9 stated in evidence that after receiving permission from Deputy Public Prosecutor, Perak he released the report to plaintiffs. He also received a request from Professor Chan – (PW11) to visit the site in which he granted as he had already completed his investigation. He would have also given permission to other registered chemists to visit the scene, if permission was asked for. After completing the investigation and handed over his report to the police, he told the police that people could now enter the site. He also stated that he disagreed that an expert would be able to draw inferences as to the cause of fire without visiting the site.

Professor Chan – (PW11) has a series of academic degrees relating to Chemistry. He was also a Fellow of Royal College of Chemistry London, and a Registered Chemist with the Malaysian Institute of Chemistry. He was a Professor of Chemistry at the University of Malaya from 1972 till 1988. After he retired, he joined a firm of Consulting Chemists.

In September 1989, he was requested by the plaintiffs to do an analysis report on a fire that had taken place at the plaintiffs' warehouse in Sitiawan. At the conclusion of his investigation, he submitted a report which was produced and marked as P18.

PW11 testified that he went to the plaintiffs' premises in Sitiawan with a colleague Mr. Yeoh on 16 September 1989 at about 11am. He spent about 31/2 hours at the site and a further few hours with the staff. He took eight samples at the site. In the course of his investigation, he could not find any hydrocarbon from the samples taken. He was unable to determine the cause of the fire, and stated in his report that "spontaneous combustion" could not be ruled out.

He stated that all combustible material had a temperature at which it catches fire by itself without any outside assistance. That temperature was called "kindling temperature". If a chemical compound coming to heat with oxygen in the atmosphere, and with the right amount of moisture coming into contact in the air, it would generate a lot of heat. When the temperature reached a "kindling point", the substance would burn with flames. This is what he called "spontaneous combustion". PW11 stated that he had read of a case where "spontaneous combustion" had taken place in the case of a newspaper. In this case, witness stated that "spontaneous combustion" could have happened.

Under cross-examination, witness stated that Sugumaran Dass – DW9 met him at the site during his visit, and told him that the fire was first detected at 1600 hours. He also did not see any containers that could carry hydrocarbon. He found no traces of accelerant at the site and he concluded after finishing his investigation, that the fire was not started, or maintained, by the use of hydrocarbon or accelerant. In his view, the act of "spontaneous combustion" could have burned the entire stock of paper in the warehouse.

Under re-examination, PW11 stated that if the fire was to be started by the use of petrol or other hydrocarbon, one would need 50 gallons to have the desired effect, and it would be difficult to bring to the site 50 gallons without being detected.

These two witnesses PW9 and PW11 had the advantage of examining the site thoroughly. After having done so, and having taken samples from the site, both PW9 and PW11 could not find any evidence of hydrocarbon, or accelerant being used at the site, to start a fire. Both witnesses did not know the cause of the fire, and both could not rule out "spontaneous combustion" as the cause of the fire.

PW10 – Yahya B. Yeop Mat stated that he signed a report relating to the fire – (P13). He stated that he was stationed in Ipoh at the relevant period and his duty was to receive reports pertaining to fire in Perak. He confirmed that P13 was prepared by En. Abu Yazid b. Siron – (DW11) and the latter confirmed that the time of the fire was about 4pm. Only then he changed the

particulars in his report. In any event, apart from some amendments in his reports, PW10 confirmed that there was ultimately only one report – (P13). and this report was the true report. The amendments in the report were done in order to correct earlier mistakes, and after PW10 had made his own investigation in this matter. PW10 being an independent person attached to Balai Bomba Malaysia had no reason to lie.

A further issue was raised by counsel for defendants about a number of corrections to the fire report. It was in evidence that a report may be amended to reflect the accuracy of details, or to amend an error, and the director of fire services may do so at his discretion. I do not attribute any sinister motive to the amendments made to the Fire Report.

The defendants' called four witnesses DW20, DW21, DW25, and DW30 with respect to issues including the investigation of the fire, and the fire itself.

Mr. Robert Collin Ranshaw – (DW20) is a retired chemist. He was at one stage employed by a company named Portals that manufactured security paper. He stated in evidence that he was sure that nitric acid was not used in the manufacture of security paper and that security paper was not capable of "spontaneous combustion".

Under cross-examination, he stated that he had not examined the paper stored at the premises of ASPM, and that each company would have its own secret formula to produce security paper, and would not disclose the chemicals used to produce security paper. He admitted that one had to carry out a test on security paper before knowing what chemicals had been used to produce the paper. In this instant case, he had not done a chemical analysis of the paper that had been burnt at the plaintiffs' warehouse.

Under further cross-examination, he further stated that urea formaldehyde is sometimes used in the manufacture of certain types of security paper, and in certain circumstances, it could be combustible. He was doubtful if "spontaneous combustion" could occur in the case of security paper, but there was a remote possibility it could have taken place.

Mr. Walter Stern – (DW21), a chemist and Professor of Chemistry at the University of Sydney, stated that "spontaneous combustion" of security paper could not happen. He disagreed with Mr. Amar Singh – (PW9) and Professor Chan Kai Cheong – (PW11) that "spontaneous combustion" can take place in the case of security paper.

Under cross-examination, he testified that certain security paper manufacturers use certain chemicals to produce paper and he would not know what chemicals were used unless he analyzed the paper. In this instant case, he had not analyzed the paper and neither did he know what chemicals were used to produce the security paper at the premises of ASPM. This witness stated that he was an expert in fire investigation, but from his evidence, he had no dealings with the security paper manufacturing trade. Lastly he stated that if no accelerant were used to set fire to the warehouse, it would have taken twelve hours for the warehouse to burn down. He admitted that he had not inspected the site of the fire.

Mr. David A. Robbins – (DW25), a consultant scientist submitted two reports based on his findings D66A and D66B. His expertise was investigation of fire and explosion. In his view, "spontaneous combustion" could not have been the cause of the fire. He testified that in his opinion, the fire had burnt for twelve hours to twenty hours before the fire brigade was called. He also stated that clean dry security paper is not capable of "spontaneous combustion", and that nitric acid was not used in the manufacture of security paper. Witness gave oral evidence in regards to certain photographs shown to him as to his conclusion that the fire burned for a long number of hours.

This witness under cross-examination stated that he had not worked in the paper industry and further stated that the paper industry did not reveal its manufacturing secrets to outsiders. He also admitted that he had not examined the paper in the warehouse, and had no idea what special chemicals were used fo manufacture the paper that had been burnt. He admitted that if chemicals had been added to the paper, and if the paper had been distributed in a certain manner, "spontaneous combustion" would take place. Further, if during transportation of the paper, some chemicals had contaminated the paper in certain circumstances, "spontaneous combustion" would not be ruled out. Finally, he added that if certain chemicals react with another chemical, "spontaneous combustion" could not be ruled out.

Mr. Barry Dhillon – (DW30) stated in evidence that he has been a fire investigator for 17 years. He never inspected the site of the fire and stated that this was a disadvantage to him. He stated that the paper in the warehouse could not have caught fire as a result of "spontaneous combustion", and in his view the fire started at least 12 hours before it was reported. He examined certain photographs taken of the goods in the warehouse prior to the fire, and gave his opinion as to the contents of those packages.

Under cross-examination, he stated that he was trained in the University of New South Wales as a Metallurgist, and had no formal education in the science of fire investigation, giving his experience in a practical manner. He further admitted that he was not a paper expert, and did not have a detailed knowledge how paper was manufactured. He also stated that a company would not disclose its price to outsiders except to its customers, and he had no personal knowledge about the truth of the value of currency mentioned by him in his report, adding that it was possible he may have been given false prices.

He did not write to the government chemist for permission to inspect the site of the fire, but instead sought permission from Dato' Soh of the Fire Brigade in Kuala Lumpur. He gave evidence in regard to weight and density of the paper from his observation of the packages, seen from certain photographs taken prior to the fire. He admitted that his views were based on assumptions, and if his assumptions were wrong, the rest of his calculations would also be wrong. He had not examined the security paper kept by the plaintiffs' in the warehouse, and did not know what types of chemicals were used to produce the types of security paper stored in the warehouse.

Mr. Siow Kwen Sia – (DW34) a Forensic Document Analyst stated in evidence he arrived at the ASPM site on 13 September 1989 but was denied entry to the site. He also stated that he did not seek permission from police to enter the site. He was asked by Mr. Balasingam when he met him later that he should produce a letter from his employer specifying exactly what he wanted to do at the site and further, a copy of any report should be given to ASPM. He stated that he was familiar with the term "spontaneous combustion" and had come across literature on "spontaneous combustion".

Under cross-examination, he admitted that without examining the site, he could never ascertain the cause of the fire. This witness admitted that if the paper was contaminated with dry oil, then it would spontaneously combust. Furthermore, if the paper was wet and had a high degree of moisture, it could also spontaneously combust, and this could happen to security paper as well, if it was contaminated, and had a high degree of moisture.

It is abundantly clear that none of the witnesses termed as experts by the defence mentioned above, inspected the site of the fire. No one ever examined the security paper kept at the warehouse, and none knew about the chemicals used in the production of the security paper. All admitted that it was crucial to visit the site. Their evidence was based among others, on photographs taken of the contents of the warehouse prior to the fire, and photographs of the site after the fire.

The totality of evidence adduced by the defence on this issue is based on guesswork, assumptions, and vague evidence. This type of evidence should be viewed with caution. I have no hesitation to conclude that the evidence of DW20, DW21, DW25, DW30 and DW34 is wholly unacceptable for reasons given earlier. I would be doing a grave injustice if I were to accept their evidence, as it is not based on primary facts and personal knowledge, but on conjecture without any proper foundation.

On the other hand, the evidence given by Mr. Amar Singh – (PW9) and Prof. Chan Kai Cheong – (PW11) was straight forward, having had the advantage of examining the site and doing certain tests. Having reviewed and considered the evidence of both PW9 and PW11 viz a vis the evidence of DW20, DW21, DW25, DW30 and DW34 I have no hesitation in accepting the evidence of PW9 and PW11, to the evidence of DW20, DW21, DW25, DW30, and DW34, whose conclusion are based not on primary evidence, but on conjecture, and without proper foundation.

The defendants also contended that the fire was deliberately started by DW10, and DW37 on the instructions of Mr. Balasingam the Executive Director of the plaintiffs' company.

Both these witnesses alleged in their evidence in court that at about 12.30am on 11 September 1989, they set about lighting fire at several places inside the warehouse with the aid of cigarette lighter. No accelerant was used. After setting fire to the warehouse, DW10 and DW37 drove to Kuala Lumpur where they stayed for about a week. On their way to Kuala Lumpur they stopped, and DW37 allegedly informed Mr. Balasingam that he and DW10 had carried out his instruction to set fire by using a prearranged code "The Jumbo has landed".

The Evidence Of DW10

Wilfred Silva – (DW10) worked for plaintiffs' company at the relevant period. He stated in detail how on 8 September 1989, he and a number of employees were asked by Mr. Balasingam to throw papers all over the warehouse including the roof beams. According to him the exercise was executed to fulfill Mr. Balasingam's grand design to set fire to the warehouse subsequently. He had prior to that, driven to Sitiawan. On the way he stopped at Pusing where he, Mr. Balasingam and one Matthew Selvarajah a fellow employee, were told by Mr. Balasingam to set fire to the warehouse. Mr. Balasingam also gave them each a cigarette lighter that he had purchased in Pusing. Mr. Balasingam told this witness that he wanted them to set fire to the warehouse in order to make a claim from the Insurance Company. At Pusing, Mr. Balasingam also purchased a tin of condensed milk in order to give a drink with some sleeping tablets to the watchman at the warehouse, in order to put him to sleep.

Apart from scattering and throwing paper in the warehouse, the goods were rearranged. After that most of the workers left and the guard was given a drink by Mr. Balasingam to make him drowsy. Mr. Balasingam left the warehouse at about 1am on 11 September 1989 with Mr. Simon Ho who was another employee of the plaintiffs' company.

After Mr. Balasingam had left, DW10 together with Matthew Selvarajah – (DW37) entered the warehouse, and proceeded to set fire to the loose paper thrown about in the warehouse. After that they closed the door of the warehouse, and they then proceeded in a car to Kuala Lumpur. On the way, Matthew Selvarajah – (DW37) informed Mr. Balasingam in a coded message that the plan to set fire to the warehouse and its contents had been implemented. Both DW10 and DW37 stayed in Kuala Lumpur for a week.

Under cross-examination, witness stated that he worked for Ringgit Rental Car for about eight months from early 1989. He was also the Managing Director of Bright Force Sdn Bhd, but stated he was as a sleeping partner, and later left his job. He stated his boss Mr. Balasingam was strict but a good boss, and did odd jobs for Mr. Balasingam. He also admitted he was a bankrupt.

Witness admitted making a Statutory Declaration (ID50) dated 1 September 1990 but denied signing it in the presence of a Commissioner for Oaths, Mr. Huang Tzu Ching – (TWT1). He also admitted signing an affidavit (P51) on 22 November 1989 but not before Mr. Kala Singh – (TW18) who is also a Commissioner for Oaths. Apart from this document, he stated that he had given the police two statements, the first of which was an accurate statement.

The Impeachment Of DW10's Evidence

Counsel for the plaintiffs, Mr. Philip Leong then applied to impeach the credit of this witness in regard to his having made a Statutory Declaration – (ID50) and an affidavit (P51) the contents of which differed materially from his evidence in court. Before I consider ID50, I have to make a ruling whether it is admissible on the evidence adduced in court. That ID50 is not the original of the document is not disputed. It is alleged that the original was with the Deponent – DW10, although DW10 denied receiving the original. Secondly, the defendants argued that the signature on ID50 was transferred from another document on to ID50.

The defendants' witness Mr. Siow Kwen Sia – (DVV34) who is a Forensic Document Analyst stated that whether a signature on a document has been transferred on to it, or not, can only be determined if the original of the document was available. DW34 further confirmed under cross-examination that he was not asked to make a finding whether the signature on ID50 was a

forgery, and neither did he determine so. In fact, he went on further to state that the signature on ID50 could be genuine. He stated he had never met DW10, and he was told that the signature of DW10 could possibly be lifted from another document into ID50.

Apart from DW34's evidence, the police report lodged by DW10 – (P57) is relevant. This report stated that when DW10 signed the document ie, ID50, it was blank. The report was lodged by DW10 in the course of certain criminal proceedings. DW34 was not informed about the contents of the report P57.

Having reviewed all the evidence, I am of the view that ID50 is admissible and therefore it is now marked as P50. Firstly, the original is no longer traceable. Secondly, the deponent does not deny signing a document, except that he denies the contents were therein when he signed P50. Again the commissioner for oaths Mr, Huang Tzu Ching stated in evidence that the Statutory Declaration was signed in his presence by DW10, and Mr. Huang's chop also appears in the document. In fact Mr. Huang stated that he was familiar with DW10 as he used to sign documents in his presence in his office, and other places. In fact Huang stated categorically that he would not sign any document which was not attested before him, and he had never attested any document in the absence of the declarant.

DW10 also denied signing an affidavit before Mr. Kala Singh, a Commissioner for Oaths on 1 August 1990. He alleged that he signed it in front of Mr. Balasingam and Mr. Matthew Selvarajah – (DW37). However Mr. Kala Singh stated quite categorically in evidence that he attested the signature of DW10 in the presence of DW10, and also put his chop on the exh. P51. Mr. Kala Singh a very senior experienced retired interpreter had no reason to lie. He stated that he was duty bound to ensure that a deponent was before him when the affidavit was affirmed.

The contents of P50 are in total variation with the evidence given by DW10 in court. In P50 he stated that on 10 September 1989 between 2pm and 7pm, he was with one Mr. Matthew Selvarajah at his residence at Ipoh Garden East Ipoh, and that he and Matthew Selvarajah did not leave the house at all during that period. He also stated that he never met Mr. Balasingam at any place or time during 9 to 11 September 1989 and neither did he speak to him on the telephone during that period.

In P57, which is a police report lodged by DW10 on 20 December 1993, he stated that he had signed P50 but when he signed it, it was blank in regard to para. A to E.

Bearing in mind the complete and total contradictions in the evidence of DW10 in court vis a vis the contents of P50 and evidence relating to P57, and having heard all the evidence, I hold as a fact that whatever explanation given by DW10 in regard to the material contradictions is not valid.

Having heard the evidence of Mr. Kala Singh and Mr. Huang Tzu Ching, I have no reason to doubt the veracity of their evidence. I therefore hold that the evidence of DW10 stands impeached.

The Evidence Of DW37

Matthew Selvarajah – (DW37), more or less gave evidence in court similar to DW10, in that he was entrusted together with DW10 by Mr. Balasingam, to set fire to the warehouse on the morning of 11 September 1989. An application was made by the plaintiffs' counsel to impeach the credit of this witness as regard to his evidence in court vis a vis the contents of a statutory declaration that he made – (D76).

Having studied the contents of his statutory declaration – (D76), I allowed the application to impeach as I found that there were material contradictions between the evidence of DW37 in court and the contents of D76.

In his evidence in court, DW37 stated that he in fact was instructed by Mr. Balasingam to set fire to the Sitiawan warehouse on 10 September 1989 where else in the statutory declaration of D37, he stated that on 10 September 1989, he was in Ipoh at Mr. Balasingam's house between 10.30pm to 10.45pm. When asked for an explanation, DW37 stated that he admitted making the statutory declaration but did so by Mr. Balasingam on his instruction. He admitted that all the contents of his statutory declaration were false.

This witness also admitted in court that he had given four to five false statements to the police in regard to the incident, and also admitted candidly that he was not an honest witness.

I found his explanation in regard to the material contradictions to be totally unsatisfactory. As such, I hold that his evidence stands impeached.

Since the evidence of DW10 and DW37 have been held to be impeached, I attach no weight to their evidence, and hold them to be totally unreliable.

The Evidence Of The Employees Of ASPM

A number of employees of the plaintiffs' company gave evidence namely DW5, DW9, DW13, DW15, DW23, and DW24. As for DW5, the gist of his evidence was that on 10 September 1989, he finished the rearrangement of stocks at the warehouse with other employees at about 10pm to 11pm. After that some

food and drinks were consumed by all present, and later he left for Ipoh with Mr. Balasingam. The next morning, Mr. Balasingam allegedly told him about the fire at the warehouse at about 10am. On arrival at the site, he saw the remains of the gutted warehouse. Later that evening, fire engines came to the site at about 4pm to 5pm.

This witness also assisted in drafting a report for Mr. Purusothman – (DW23) to be lodged at the Sitiawan police station and went along with DW23 who then lodged a report accordingly. Under cross-examination, DW5 admitted telling a fire officer that the fire started at 4pm. He could not remember if he had told any other lies. He also admitted that prior to the fire, he had checked the contents of the warehouse, and wrote the details of stocks in a Stock Book. Further, he admitted the contents of the police report drafted by him for Purusothman – (DW23) were false. He also admitted telling lies to Professor Chan – (PW11) who had arrived at the site to conduct an examination. Further, he admitted giving false statements to the police about the time of the fire. He lied to the police even though he was not threatened, or paid any money, to tell a lie. He was aware it was an offence to tell a lie.

To sum up, Ho Wai Fook – (DW5) made false statement to the police in regard to the facts surrounding the fire that occurred at the warehouse. Witness also lied on oath in criminal proceedings at the sessions court relating to a criminal case. Finally, this witness admitted telling the police that on 11 September 1989, he spent the morning with Mr. Balasingam and arrived in Sitiawan around 3pm to 4pm and that the fire started at 4pm on that date.

Mr. Purusothman – (DW23) testified that Mr. Muniandy – (DW31) a guard at the ASPM premises informed him about the fire on the morning of 11 September 1989 at about 6.30am. He then called Sugumaran Dass – (DW9), who then fetched DW23 in his car and both proceeded to the site. On arrival, he saw the gutted warehouse and then called Mr. Balasingam and told him about the fire. Mr. Balasingam arrived at the site at about 10am to 10.30am together with Mr. Ho Wai Fook – (DW5). Later at 3.30pm, Mr. Balasingam told DW23 to call the Bomba which DW23 complied with.

Later DW23 lodged a police report at Sitiawan police station – (P62). DW23 claimed that the report was false, although he knew it was an offence to make a false report. This witness admitted making a number of false statements to the police, and also admitted lying to Mr. Lum Siew Wai – (DW27).

Mr. Sugumaran Dass – (DW9) was a former site supervisor for the plaintiffs' company. He stated that on the night of 10 September 1989 he had, on the instruction of Mr. Balasingam helped to strew paper at the warehouse together

with other employee and that he later returned home. He first came to know about the fire from Mr Purusothnam – (DW23) who informed him about the fire on 11 September 1989 between 6.30am and 7am. They then proceeded to the site and then he noticed that the warehouse had been gutted and saw smoke and ash. Mr. Balasingam was informed and he later arrived at the site at about 10am to 11am with Ho Wai Fook – (DW5). On 12 September 1989, he accompanied Mr. Purusothman – (DW23) to lodge a report at Sitiawan police station. In the report he stated that the fire was detected at 4pm on 11 September 1989, that he alleged was false. This witness admitted making a false statement to Sgt. Abdullah of Sitiawan police, and also signed the statement. He confirmed of his lying spree to Insp. Wan Badrul although he was warned to tell the truth. He also gave further false statement to the police at Bukit Aman, Kuala Lumpur. He admitted that Mr. Balasingam was a good employer and did not lodge any report against him for threatening him. He even admitted lying to Professor Chan – (PW11) when he told him that the fire started on 11 September 1989 at 4pm.

Mr. Radhakrishnan – (DW24) was a gardener employed at plaintiffs' company. He testified that he also helped to scatter paper at the warehouse on the night of 10 September 89. The following morning, he went to work at about 7.30am. to 8am. and noticed the gutted warehouse. The witness under cross-examination was referred to a statutory declaration – (D65) affirmed by him. He admitted that he signed the statutory declaration in the presence of a commissioner for oaths TWT1 – Mr. Jeganathan. DW24 denied knowing the contents of D65 when he signed the document, and neither was he worried or concerned about what the document was all about.

Counsel for the plaintiffs then applied to impeach the credit of this witness and asked the court to look at the contents of the statutory declaration – (D65). Having examined D65, the court found that there were material contradictions between the evidence of this witness in court and the contents of D65, and allowed the application. Upon being questioned about the contents of D65 where the witness stated that when he left the site at 4pm on 11 September 1989, he saw the warehouse and site office of ASPM and did not see any fire or smoke coming out from the warehouse and the site office. Witness stated that the contents of D65 was not his.

Upon examining the evidence of this witness as a whole, I found that there has been a total lack of explanation, in regard to the material contradictions, between his evidence in court, and the contents of his statutory declaration, and I found his explanation to be wholly unsatisfactorily. As such, I rule that the evidence of this witness is impeached, and he is no longer worthy of credit.

Mr. Subramaniam s/o Maruthamuthu – (DW13) gave evidence to the effect that at the material time, he was working as a driver for Mr. Balasingam. He remembers seeing a fire, but did not remember whether it was in the afternoon or evening. On the day in question, he went to the ASPM premises with Mr. Balasingam and Mr. Ho Wai Fook and on arrival, he noticed that the warehouse had burnt down. The previous day prior to the fire, he had gone to Pusing with Mr. Balasingam where he met a male named Willy and another male Indian. He also later proceeded to the ASPM premises where he saw a security guard – Muniandy (DW31) and some workers arranging papers. Later at about midnight, he returned to Ipoh with Mr. Balasingam and Mr. Ho Wai Fook. Under cross-examination, witness admitted having made a statutory declaration – (P52) affirmed before Mr. Jeganathan TWT1 – a commissioner for oaths. He was not sure if the contents were explained to him by Mr. Jeganathan. However, he added that if the commissioner for oaths stated that the contents had been explained to him, it might very well be true.

In any event, the gist of P52 is that on the morning of 10 September 1989, witness drove Mr. Balasingam to a friend's house and a supermarket. The evening at 6.30pm, he drove Mr. Balasingam to a temple, and later to a supermarket and left Mr. Balasingam at his house at 10pm.

On 11 September 1989 at 2pm he was in Ipoh and at 2.15pm he drove Mr. Balasingam and Ho Wai Fook – (DW5) to Sitiawan to the premises of ASPM. On arrival there, he saw two fire engines attending to a fire at the warehouse. His evidence in the statutory declaration – (P52) contradicts flatly his evidence given in court. He also confirmed that maybe what he had stated in the first police statement was substantially, the same as what he had stated in the statutory declaration – (P52). I found the evidence of DW13 to be totally unreliable in view of the many contradictions in his evidence, bearing in mind the contents of P52. Sinniah s/o Dharuman – (DW 15), testified that in 1989 he worked as a general worker at the ASPM. He stated one morning he reached his place of work and saw smoke and fire emanating from the warehouse. He stated that the previous evening, he and some workers scattered some papers in the warehouse on the instruction of Mr. Balasingam.

After the business of scattering the papers was over, food and drinks were served to all present including a male chinese who had asked to spend the night at the site. The witness also saw the guard Muniandy – (DW31) holding his head with his hands and was vomiting. DW15 admitted making a statutory declaration – (P67) before a commissioner for oaths – Mr. Jeganathan (TWT1) but stated that Mr. Jeganathan did not translate the contents of the statutory declaration to him. Plaintiffs' counsel applied to the court to impeach the credit of this witness by asking court to view the statutory declaration.

After having viewed the contents of statutory declaration, I was of the view that there were material contradictions in the evidence of this witness in court *vis a vis* the contents of the statutory declaration and allowed plaintiffs' counsel to proceed.

When asked to explain the discrepancies between his evidence in court and the statement in P67, witness stated that the contents in P67 were not true. In fact in P67, witness had stated that on 11 September 1989, he was sitting in the porch of the site office when he saw smoke followed by fire coming from the warehouse.

Mr. Jeganathan – (TWT1) was called by defendants' counsel (in a trial within a trial) to ascertain the facts surrounding the recording of P67. He stated quite emphatically that P67 was signed by DW15 in his presence, and that he explained its contents to DW15 who understood the contents of P67 and signed it in the presence of Mr. Jeganathan. DW15 did not give a satisfactory explanation as to the material contradictions in his evidence in court vis a vis the contradictory statement in P67. As such, I rule that his evidence stands impeached and I place no reliance on his evidence.

Another former employee of ASPM, Mr. Nithi Anandarajan – DW16 stated in his evidence that he had no personal knowledge in regard to the details of the stocks of paper kept in the ASPM warehouse in Sitiawan as he had never been there. As such his evidence is of little value.

After having perused the evidence given by DW5, DW9, DW13, DW15, DW23 and DW24 and for reasons stated above, I hold as a fact that their evidence is unreliable and unsafe.

The Time When The Fire Occurred

The plaintiffs evidence was that the fire was detected at about 4pm on 11 September 1989. Mr. Purusothman – (DW23) an employee of plaintiffs' company lodged a report on 12 September 1989 at 10.15am at Balai Polis Sitiawan. In his report, he also stated that he wanted to take out a fire extinguisher from inside the store (warehouse) but could not do so, as the key was not with him. At about 4.35pm, he called the Fire Brigade, but by the time the Fire Brigade arrived, the roof of the warehouse had collapsed, and the Fire Brigade attended to the fire. Mr. Purusothman – (DW23) and another employee Mr. Sugumaran Dass – (DW9) also informed Professor Chan Kai Cheong – (PW11) that they were first informed about the fire at about 4pm by the watchman (See report by Professor Chan Kai Cheong and Yeoh Guan Ann – (P18) at p. 43 of PBD).

Apart from the evidence given by the above-mentioned witnesses, there were a number of reports by the Fire Brigade Department.

En. Yahaya B. Yeop Mat Arop – (PW10) stated that he signed a report relating to the fire. The report was produced at the trial and marked as P13. The report states that the cause of the fire was unknown, and it was reported at about 4.39pm on 11 September 1989 by Mr. Puru (DW23).

This fact was confirmed by En. Abu Yazid b. Siron – (DW11) who was then Acting Supervisor at the Sitiawan Fire Department at the relevant period. He stated that upon receiving the report, he went to the site with two Fire Engines and a number of personnel. He arrived at the site at 4.50pm. On arrival, he saw smoke and a building that had already burned down. In his opinion the fire had started about two hours prior to his arrival at the site. DW11 stated that he remained at the site till about 7pm. He referred to a report – (D 16) and stated certain amendments were done by him in regard to the report upon receiving information from Mr. Balasingam, and Mr. Ho Wai Fook. Under cross-examination, this witness admitted that he had heard of the expression "spontaneous combustion" and knew its meaning. As far as he was concerned after conducting his examination of the site, he did not know the cause of the fire.

Mr. Lau Yen Thin – PW8 stated in evidence that in 1989, he was working as an Insurance Agent, and he used to give business to insurance companies including Provincial Insurance. He went to see Mr. Balasingam on 8 September 1989 in order to get some Insurance business from him on 10 September 1989. Mr. Balasingam asked PW8 to see him at the warehouse on the next day ie, 11 September 1989 and he would sign a group personal accident policy.

On 11 September 1989 at about 4pm – PW8 went to the warehouse in Sitiawan and on arrival there he saw it was on fire. Later he saw Mr. Balasingam driving into the compound at about 5pm to 6pm. He did not speak to him at that moment and later returned to Ipoh. Under cross-examination, witness stated that when he arrived at the site on 11 September 1989, the roof of the warehouse had not collapsed. He also saw two fire engines arriving at the scene at about 4.45pm.

The defence also produced a number of witnesses namely DW1, DW2, DW3, DW4, DW6, DW7, DW14, DW28, DW35, and DW36 who stated that by the morning of 11 September 1989, the warehouse had been razed. A number of workers for plaintiffs' company DW9, DW15, DW23, and DW24 which I have dealt earlier also stated that the warehouse had been razed to the ground.

It was the defendants' case that the fire took place in the early hours of 11 September 1989, and that by 7am to 8am the warehouse had been completely burnt.

The witnesses called to support this proposition were DW1, DW2, DW3, DW4, DW6, DW7, DW11, DW14, DW28, DW35, and DW36. All the witnesses testified in court that sometime in September, they saw fire/smoke coming from the direction of the said warehouse.

DW1 – L/Kpl 74783 Tun Putih b. Samah stated that he saw smoke and a glow on the morning of 11 September 1989, and noticed the burned down warehouse. He made no note in his diary, and did not call the fire brigade, nor inform the police.

DW2 – Zainuddin b. Zain also stated he saw that the warehouse had been burned down, but did not state the date. He also made no note in his diary, informed neither the Bomba nor the police department and lodged a report.

DW3 – Mutaza b. Yeop Wasir stated that on 11 September 1989 at about 7am, he saw fire and smoke coming from the warehouse, but under cross-examination, he stated that he was not sure of the date.

DW4 – Ting Long Meng saw a glow of fire from a distance of 4 to 6 kilometres.

DW6 – Laily b. Abd. Hamid only saw smoke, and stated that the fire incident might have been on 12 September 1989.

DW7 – Meor Kamar b. Said stated that he saw the gutted premises on 12 September 1989.

DW11 – Abu Yazid b. Siron in 1989 was attached to the Sitiawan Fire Department. He stated that on 11 September 1989, there was a fire alarm at Sitiawan Fire Station at 4.39pm. He then went to plaintiffs' warehouse site with two fire engines and saw smoke coming from the direction of ASPM. On arrival at the site, he saw that the warehouse had burnt down. In his opinion, the fire had started more or less at about 2pm.

DW14 – Miss Wong Siew Ting stated that at the material time, she was staying in Kg. Acheh, Sitiawan. One morning, she saw smoke coming out from the warehouse at ASPM but she did not remember the date, and further stated that it could be on 12 September 1989. She admitted under cross-examination that one Sunny Dass – (DW9) told her what to speak in court. This witness testimony is not of much help to the defendants' reason as to when actually the fire started.

DW28 – Narasamulu s/o Raguvel stated in evidence that he did not remember the date of the fire.

DW35 – Lee Ho Heng stated that he noticed one morning while going to work that the warehouse was not there anymore. He stated that it could be on 12, 13 or 14 September 1989.

DW36 – Sgt. Nasoruddin b. Surihan claimed that he saw the building burn down on 11 September 1989. He also made no police report about the incident. He could not remember dates relating to his marriage and the birth of his first and second child.

That all the defence witnesses saw the remains of a gutted building is probable, as there is no dispute that the warehouse did burn down on 11 September 1989. However, some of the witnesses did not remember the actual date on which they saw the gutted warehouse.

This is very reasonable. The event took place ten years ago. As for those who stated that they saw the gutted down warehouse on the morning of 11 September 1989, it appears to me too far fetched for them to remember the exact date after 10 years. None of them who stated that they saw the gutted down warehouse on 11 September 1989 have given a reasonable and credible reason, as for how, and why, they could remember exactly the date on which they saw the gutted down warehouse. Most of them alleged that they were going about their daily business and had nothing in my view, to have actual interest in the event, except to observe a gutted down warehouse.

Therefore, it is in my considered view that those witnesses who stated that they saw the gutted down warehouse on the morning of 11 September 1989 were either lying, or have failed to convince me satisfactorily as to how they could remember the exact date of the incident after a lapse of ten years.

The evidence of PW8 who is an independent witness apart from the evidence of other witnesses tends to confirm the fact that the fire most likely and probably had occurred on the afternoon of 11 September 1989 around 4pm. Furthermore, the evidence by En. Yahya b. Yeop Mat Arop – (PW10) and the office report – (P13). by the Balai Bomba together with the evidence of Abu Yazid b. Siron – (DW11) fortifies my view that the fire started in the afternoon of 11 September 1989, bearing in mind that the evidence of DW10 and DW37 had been held to be impeached. I hold PW8 to be a witness of truth as he has given his evidence in a straightforward manner with clarity. His evidence lends total support to the evidence of PW10 and the contents of the fire report – (P13).

The Burden Of Proof Of The Defendants

In raising the issue of fraud on the part of the plaintiffs, the burden of proof on the defence is that of proof beyond reasonable doubt. Refer to the case of *Eastern & Oriental Hotel 1951 Sdn Bhd v. Ellarious George Fernandez & Anor* [1989] 1 MLJ – p. 35 when Lee Hun Hoe CJ (Borneo) stated that the onus of proof of fraud is proof beyond reasonable doubt. In the case of *Tai Lee Finance Co. Sdn Bhd v. Official Assignee & Ors* [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 the court also held that the onus is upon a person alleging fraud to prove fraud, not on a balance of probabilities, but beyond reasonable doubt.

Bearing the salutary principles enunciated in the above mentioned cases, and having examined the evidence as a whole adduced at the trial, I hold as a fact that the defendants have failed to prove fraud against the plaintiffs beyond reasonable doubt. There may be suspicion that the fire was self-induced by the plaintiffs, however, fraud must be established beyond all reasonable doubt. It cannot be based on suspicion and conjecture. See the case of *Hansraj Gupta & Ors v. Dehra Dun-Mussoorie Electric Tramway Co. Ltd.* [1940] AIR Privy Council – p. 98 and *A.L.N. Narayanan Chettyar & Anor v. Official Assignee High Court Rangoon & Anor* [1941] AIR Privy Council – p. 93.

The evidence of defendants' witnesses was based on photographs and other documents, and therein lies the weakness in their evidence. However the plaintiffs' counsel contends that defendants are estopped from pleading fraud, as it was not a ground on which the defendants repudiated liability. The defendants repudiated liability for breach of condition 11 and 12 of the policy.

Although the defendants called witnesses to show that Mr. Balasingam planned to set fire through his employees to the warehouse at the material time, the evidence tendered in court is not only tainted but totally unreliable, and I hold as a fact that there is no independent witness who could shed any light as to how the fire started at the warehouse at the material time and date. Counsel for the defendants' argued that there were certain conditions attached to the policy that showed a degree of preparation by Mr. Balasingam on ASPM to plan a fire at the premises of ASPM. The conditions were namely:

(a) the appointment of loss adjusters in the event of a claim had to be agreed to by ASPM.

(b) the policy covers loss or damages caused by "spontaneous combustion"

(c) soon after arranging for the increase – of Insurance Cover of the stocks at the warehouse, (PW13) – Tan Cheng Hin the then Branch Manager of Provincial Insurance in Ipoh was not allowed to enter the warehouse on 6 September 1989 on the grounds that goods were in the midst of arranging at the warehouse. It was also submitted by counsel for the defendants' that PW13 was induced to sign the Stock Book after completing his inspection of the goods at the warehouse on 8 September 1989, so as to obviate the necessity of proving the value of the goods in case of fire.

To my mind, a policy of insurance is an agreement between the Insured and the Insurer freely arrived at, and signed to by both parties. Although some of the terms as in this case appear unusual, they are by no means fraudulent. In fact it is only fair that an insured be consulted as to the appointment of an adjuster in case he had any reservation.

Counsel for the defendants also submitted that there were no supporting documentary evidence tendered by the plaintiffs in regard to the details of stocks imported, and kept in the ASPM warehouse in Sitiawan.

In my view, plaintiffs have amply demonstrated from the details in the Stock Book (P32) and oral evidence through witnesses that there were ample stocks of a variety of paper including security paper, kept at the premises of ASPM at the material time, and as such the argument advanced by the defendants' counsel is not tenable.

In regard to the clause relating to "spontaneous combustion" there is nothing irregular or fraudulent. If the Insurers felt it to be so, they would have declined to include the said clause in the policy. In any event, "spontaneous combustion" according to the evidence of some witnesses both from plaintiffs' and defendants' may occur in cases relating to stocks of paper.

As regards to the evidence of PW13 – Tan Cheng Hin, he was instructed to inspect the goods at the warehouse, and the fact that he could not do so due to unavoidable circumstances on 6 September 1989 should not be a reason for suspecting that the plaintiffs' were up to no good. Two days later on 8 September 1989, he inspected the warehouse, and was given free access, and also took many photographs of the goods in the warehouse.

He was an experienced person; being the Branch Manager of Provincial Insurance Company in Ipoh, and to my mind there is nothing to indicate in his evidence that he was tricked into affixing his signature in the Stock Book together with making the other entries.

In fact, PW13 was specifically asked by his superiors to check whether there were stocks in the warehouse, and stated in evidence that he had the necessary, and long experience in the insurance industry. He also had done similar checks of goods in other companies. PW13 admitted freely signing the Stock Book, verifying the details of stocks. He stated he only signed the Stock Book after a visual look at the stocks, and added that he would not have signed the book if the stocks had not been there.

Counsel for the defendants also submitted to court that the sudden increase in the amount of insurance cover was also rather suspicious as if took place first prior to the fire. It is to be noted that increase in insurance cover is done on a mutual basis by insurer and the insured. Just because it occurred prior to the fire by itself, it should not be viewed with suspicion. In any event, the insurer made no challenge whatsoever to the plaintiffs' on this matter, and in fact readily agreed to double the cover. In fact Lynette Ow Lay Kuan – DW33 testified that the company was wound up after the fire but was trading at a profit before the fire occurred.

In my view on the totality of evidence, fraud has not been proved beyond reasonable doubt.

It was argued by learned counsel for the defendants that Mr. Balasingam was the mastermind who orchestrated the whole episode of starting fire to the warehouse and should have been called to give evidence for the plaintiffs. Further it was submitted that he should refute all the allegations made against him by the various witnesses for the defendants, failing which the court should draw an adverse inference against the plaintiffs under s. 114(g) of the Evidence Act.

Mr. Balasingam for the record was acquitted and discharged by the Sessions Court Ipoh (KT 62-4-90) of a charge under s. 109 of the Penal Code that reads together with s. 34 of the Penal Code for having abetted with DW10 and DW37 in setting fire to the contents of the plaintiffs' warehouse. It is not incumbent on the plaintiffs to call Mr. Balasingam fo refute allegations made by the defendants witnesses most of whom have either been impeached or held to be unreliable by me for various reasons.

It must be borne in mind that Mr. Balasingam is not the plaintiff in this case. As far as the plaintiffs are concerned, they have to their satisfaction produced all relevant witnesses who could assist the plaintiffs' case. In my view, the non-production of Mr. Balasingam as a witness for the plaintiffs' does not on the available evidence adduced in court, make me come to the conclusion that I should draw an adverse inference against the plaintiffs under s. 114(g) of the Evidence Act 1950.

It was urged upon me by the defendants' counsel that I should also draw an inference against the plaintiffs for them not having called Ho Wai Fook – DW5 and Matthew Selvarajah – DW37 as their witnesses. I see from the evidence from Manivannan s/o Arumugum – PW19, attempts were made on three occasions to locate them to give evidence in court but the attempts were unsuccessful. After plaintiffs had closed their case, defendants produced these two witnesses, but at that juncture, plaintiffs having closed their case did not intend to call these two witnesses. In the circumstances, I do not see any cogent reason for me to draw an adverse inference against the plaintiffs for not calling Ho Wai Fook and Matthew Selvarajah as witnesses.

The defendants further asserted that there was breach of condition 19 of the policy which states:

Condition 19 - The limit for company's liability

> In no case whatever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action of arbitration.

It must be noted that the fire occurred on 11 September 1989 whereas the plaintiffs filed the writ on 11 September 1990. Defendants contended that the filing of the writ was not within the twelve months period as stipulated in condition 19. They had referred to the case of *Chop Eng Thye Co. v. Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ – p. 161. The plaintiff in turn submitted that the writ was filed just within time.

The legality of condition 19 was considered in the case of *The New Zealand Insurance Co. Ltd v. Ong Choon Lim t/a Syarikat Federal Motor Trading* [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230. The then Supreme Court held that a similarly worded condition 19 of the fire policy contravened s. 29 of the Contracts Act. LC Vohrah J (as he then was) after reviewing several Indian cases and the judgment of the Court of Appeal in the case of *Federated Malay States in Corporation Royal Exchange v. Teck Guan* [1912] 3 FMSLR 92, stated:

> It is clear therefore that the legal distinction that obtains in the relevant Indian decisions that have been referred to between a right and its remedy in the context of the consequences that flow therefrom does not exist in Malaysian law "in the eyes of which the distinction is merely semantic. We do not think that a right can be dissociated from its remedy. We are therefore of the opinion that Condition 19 of the fire policy is void by virtue of the imperative

words of Section 29 of the Contracts Act as it clearly limits the time within which the respondent can enforce his right under section 6(1)(g) of the Limitation Act.

In the instant case, in light of the clear provisions of the statute, I find the defendants' contention that the plaintiffs had breached condition 19 is untenable.

Furthermore, in matters relating to computation of time, it is pertinent to refer to the Interpretation Acts 1948 and 1967 (Act 388). Section 54 of the said Act states:

> Computation of time
>
> (1) In computing time for the purposes of any written law – a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

wheras s. 105 of the Act provides:

> Computation of time
>
> In computing time for the purposes of any written law, unless the contrary intention appears:
>
> (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;

Conclusion

Having heard all the evidence adduced at the trial, it is my view that although the defendants may have shown a degree of suspicion, that in my view is insufficient for me to conclude that fraud has been established beyond reasonable doubt. Therefore, on the totality of evidence before me, I am satisfied that the plaintiffs have proved their case on a balance of probabilities. In the circumstances, I enter judgment for the plaintiffs for the sum of RM16,124,500 with interest at 8% from the date of filing "the writ and thereafter at 8% to the date of satisfaction.

Although an amount recoverable under a policy may not bear interest as a matter of course, I have decided to do so for the following reasons. Firstly, after the writ was filed in 1990, defendants filed an application to strike out the plaintiffs' claim for want of prosecution in 1995. This application was made rather late in the day and was dismissed by the Court of Appeal. In 1998, the defendants filed an application for security for costs against the plaintiffs, and this application is still pending at the Court of Appeal.

The conduct of the defendants resulted in an inordinate delay in these proceedings. Lastly, defendants had also claimed not to have had the ability to trace witnesses, yet almost forty were produced, both local and foreign.

As such, I am of the view that an order that the judgment sum bears interest is fair and proper. Costs to the plaintiffs.